

Anti-dumping and China: three major Chinese victories in dispute resolution

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Abstract

China has traditionally been treated as a non-market economy for purposes of anti-dumping investigations. The result was that countries determined whether dumping was taking place by comparing the export price from China with the normal value established in a third country. The European Union (EU) also determined the export price from China on the basis of the average export price from that country unless an exporter met specific requirements set for the EU's 'individual treatment' standard. China challenged these practices both in the World Trade Organisation (WTO) and in European courts, while the South African International Trade Administration Commission (ITAC) appealed a decision from the High Court on how it had to treat imports from China. The Appellate Body of the WTO ruled that China's accession agreement to the WTO did not provide for the determination of export prices on any basis other than each individual exporter's own prices, unless the investigating authority made a specific finding that two or more parties are related, in which case those parties could be treated as a single entity. Before the European Court of Justice (ECJ), in an appeal lodged by the Council of the European Union, the ECJ found that the Council could not equate 'government control' in a company with 'government interference', and that the Council had to make a specific finding as regards interference before it could find that a company was not operating under market conditions. In South Africa, the Supreme Court of Appeal found that there was no duty on ITAC to consider any information submitted by parties to show that exporters in China were operating under non-market conditions, thus paving the way for ITAC always to treat cooperating exporters as operating under market conditions in disregard of the provisions of the applicable legislation. The verdicts in these three fora have significantly altered the way in which future anti-dumping investigations will be conducted against Chinese exporters, and will allow those exporters greater access to the EU and South African markets. It is submitted that while the decisions in the WTO and the ECJ are

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correct, the Supreme Court of Appeal in South Africa delivered an incorrect decision in the ITAC appeal, and in so doing rendered parts of the law redundant.

Introduction

A number of recent decisions in the World Trade Organisation (WTO), the European Union (EU), and South Africa have significantly strengthened China's position in anti-dumping investigations.¹ The first decision – in the WTO – was long overdue, and, along with decisions in the European Court of Justice (ECJ), will grant Chinese exporters better access to the EU market. The WTO decision has been described as 'a veritable rock thrown into the pool of the EU's anti-dumping practice, the ripples of which are sure to be felt for a long time yet'.² The final decision relates to a verdict in the South African Supreme Court of Appeal (SCA) which negates certain provisions in South African legislation and has effectively granted automatic market economy status to all cooperating Chinese exporters.

Dumping takes place when a product is exported at a price lower than its normal value, which is usually the price at which the like product is sold in

¹ For a theoretical discussion on anti-dumping, see eg Basson *Ontwrigtende mededinging in Suid-Afrika se invoerhandel met spesifieke verwysing na dumping* (M Comm thesis, University of Pretoria, 1980); Beseler *Die Abwehr von Dumping und Subventionen durch die europäischen Gemeinschaften* (1980); Boltuck & Litan (eds) *Down in the dumps: administration of the unfair trade laws* (1991); Bienen, Brink & Ciuriack *Guide to international anti-dumping practice* (2013); Brink *A theoretical framework for anti-dumping law in South Africa* (LLD thesis University of Pretoria, 2004); Brink 'Anti-dumping in South Africa' *Tralac Working Paper D12W07/2012* (2012); Didier *WTO Trade instruments in EU law: commercial policy instruments: dumping, subsidies, safeguards, public procurement* (1999); Finger (ed) *Antidumping: how it works and who gets hurt* (1993); Hindley & Messerlin *Antidumping industrial policy: legalized protection in the WTO and what to do about it* (1996); Landsittel *Dumping in Aussenhandels- und Wettbewerbsrecht* (1987); Lawrence (ed) *Brookings Trade Forum 1998* (1998); Marceau *Anti-dumping and Anti-trust issues in free trade areas* (1994); *Michigan Yearbook of International Legal Studies Volume 1: Antidumping Law: Policy and Implementation* (The University of Michigan Press 1979); Moen *Public interest issues in international and domestic anti-dumping law: the WTO, European Communities and Canada* (Graduate Institute of International Studies 1998); Van Bael & Bellis *Anti-dumping and other trade protection laws of the EC* (5ed 2009); Viner *Dumping: a problem in international trade* (1966).

² De Baere 'The impact of EU and WTO Dispute Settlement On EU trade defence actions: towards a more level playing field?' *Who's who international trade & customs* (November 2012), available at: <http://whoswholegal.com/news/features/article/30091/the-impact-eu-wto-dispute-settlement-eu-trade-defence-actions-towards-level-playing-field/> (last accessed 5 June 2013).

the ordinary course of trade in the exporting country.³ If this dumping causes material injury to an industry producing a like product in the importing country, the importing country may impose an anti-dumping duty not exceeding the margin of dumping.⁴ Where the exports are made from a country with a non-market economy, special provisions apply, and a strict comparison with the price in the exporting country is not always made⁵ These special provisions typically apply to the People's Republic of China (China), although they may also be applied to former Soviet states.⁶ When China joined the WTO in 2001, it agreed to a special dispensation as regards dumping. This dispensation provided that the investigating country could determine the normal value for China on a basis that was not based on a strict comparison of the price or costs in the Chinese domestic market.⁷

This article provides an overview of non-market economy anti-dumping provisions in the WTO, the EU, and South Africa, and discusses recent dispute settlement proceedings in each of these fora that will have a profound impact on how future anti-dumping investigations will be conducted, specifically against imports from China.

**The WTO, EU and South Africa non-market economy provisions:
an overview**

As indicated above, dumping takes place when the export price from a country is lower than the normal value of the like product, and the normal value is usually determined with reference to the selling price in the ordinary course of trade for the like product when destined for domestic consumption. However, where a country, or an industry or company in a country, is regarded as operating under non-market conditions, that is, where decisions regarding production, costs, and sales are significantly affected by present or past government intervention, many countries will not apply the standard

³ Art VI.1 of the General Agreement on Tariffs and Trade (GATT); art 2.1 of the Agreement on Implementation of Article VI of GATT (the AD Agreement); s 32(2)(b) of the International Trade Administration Act 71 of 2002 (ITA Act). See also Brink 'A nutshell guide to anti-dumping' 71 (2008) *THRHR* 255. Note that the purpose of this article is not to provide a philosophical or ideological discussion of dumping and anti-dumping action. Refer to the references in n 1 above for philosophical or ideological discussions on dumping and anti-dumping.

⁴ Article VI.2 of GATT; Art 9.1 of the AD Agreement; s 32(2)(b) of the ITA Act, read with Anti-Dumping Regulations 13 and 16.

⁵ Section 32(4) of the ITA Act.

⁶ Regulation 2.7(a) of European Council Regulation 1225/2009 (EC Regulation).

⁷ Article 15 of the Accession of the People's Republic of China WT/L/432 (23 November 2001) (China's Protocol).

methodology but resort rather to the ‘non-market economy’ methodology. In terms of the non-market economy methodology, the export price from the non-market economy country will usually be compared to the normal value in a third or surrogate country.⁸ This gives the exporter very little control over the dumping determination. However, a deviation from the norm is provided for in the WTO, as well as in the legislation of both the EU and South Africa.

WTO provisions

Ad note 2 to GATT article VI.1 provides that

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

Before China’s accession to the WTO, this provision was generally applied to China by most WTO members without any further investigation into the question of whether industries or companies in China were operating under such conditions. It is doubtful, however, whether trade in any country (with the possible exception of North Korea) is still conducted under conditions of complete, or substantially complete, monopoly by government and where all prices are fixed by government. It is therefore difficult to rely exclusively on this provision in current anti-dumping investigations. Article 2.2 of the Anti-Dumping Agreement (ADA) provides that

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country *or when, because of the particular market situation ... such sales do not permit a proper comparison*, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. (Footnote omitted, own emphasis.)

⁸ Regulation 2.7 of EU Regulation 1225/2009 (EU Anti-Dumping Regulation); s 32(4) of the ITA Act and Reg 8.14–8.16 of the South African Anti-Dumping Regulations.

This paragraph provides for a deviation from the usual determination of the normal value, ie not considering the price of domestic sales, but still requires the investigating authority to conduct investigations on the basis of costs in China or of the selling prices from China to third markets. It therefore does not address the issue of costs and prices affected by government intervention in China. Accordingly, when China acceded to the WTO, it was required to make a significant concession to other WTO members in their anti-dumping investigations against China, by agreeing to the following wording in article 15 of its Protocol of Accession

Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('Anti-Dumping Agreement') and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

- (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
 - (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
 - (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
- (b) ...
- (c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices. ...
- (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member,

that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

As a result, where a country had non-market economy legislation in place at the time of China's accession to the WTO – which both the EU and South Africa had – it may determine the normal value for Chinese exporters on the basis of prices not determined in China. Typically, such normal values are determined in a third or surrogate country⁹ and the export prices are compared to these surrogate normal values to determine whether dumping is taking place.

EU provisions

Regulation 2.7 of the EU Anti-Dumping Regulation (ADR) provides that the 'normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries ... duly adjusted if necessary to include a reasonable profit margin', and that the third country shall be selected in 'a not unreasonable manner'. It further provides that for non-market economy WTO members, the normal value may be determined on the basis of 'properly substantiated claims by one or more producers subject to the investigation ... that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned.' It then continues to detail the specific criteria that must be met.¹⁰ As regards export prices, the EU Regulations provide that the 'price actually paid or payable' should normally be used, and where this cannot be used as the export price is unreliable, including on the basis of trade between related parties, the export price may be constructed using the price to an independent buyer as starting point.¹¹ Additional information is provided on how adjustments should be made to the export price to establish a 'reliable export price' at the EU frontier, that is, on a cost, insurance, and freight (CIF) basis.¹² Article 9.5 of the EU ADR requires that, in principle, an anti-

⁹ Regulation 2.7 of EU Regulation 1225/2009 (EU Anti-Dumping Regulation); s 32(4) of the ITA Act and Reg 8.14–8.16 of the South African Anti-Dumping Regulations.

¹⁰ See Reg 2.7(c) of the EU Anti-Dumping Regulation and *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* WT/DS397/R, adopted 28 July 2011 (Panel Report, as modified by the Appellate Body report) (hereinafter *EC – Fasteners Panel Report*) note 452.

¹¹ EU Anti-Dumping Regulations 2.8 and 2.9. Note that the provisions quoted are those that were in effect at the time the investigations that led to the disputes were conducted.

¹² Council Regulation (EC) No 1225/2009 of 30 November 2009 (EU Anti-Dumping Regulation).

dumping duty be calculated individually for each supplier of a product found to be dumped. There are, however, two exceptions to this principle: where it is ‘impracticable’ to specify the duty for each supplier; and where normal values for non-market economy (NME) suppliers are determined on the basis of normal values established in a third or surrogate country. Exempted from the country-wide rate are NME suppliers that meet the ‘individual treatment’ requirements, in terms of which an exporter may be granted individual treatment if it meets all of the following criteria:

- in the case of wholly or partly foreign-owned firms or joint ventures, exporters are free to repatriate capital and profits;
- export prices and quantities, and conditions and terms of sale are freely determined;
- the majority of the shares belong to private persons; state officials appearing on the board of directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from state interference;
- exchange rate conversions are carried out at the market rate; and
- state interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.¹³

Only exporters that meet the individual treatment test are accorded individual anti-dumping duties, while those that fail the test are accorded a single country-wide anti-dumping duty rate.¹⁴

South African legislative provisions

In South Africa, section 32(2)(b) of the International Trade Administration Act 71 of 2002 (ITA Act) defines normal value for purposes of anti-dumping investigations in South Africa, but this is qualified by section 32(4), which specifically provides that

If the Commission ... concludes that the normal value of the goods in question is, as a result of government intervention in the exporting country or country of origin, not determined according to free market principles, the Commission may apply to those goods a normal value of the goods, established in respect of a third or surrogate country.

¹³ Art 9.5 of the EU Anti-Dumping Regulations. See also *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* WT/DS397/AB.R, adopted 28 July 2011 (Appellate Body) (hereafter *EC – Fasteners Appellate Body Report*) par 276.

¹⁴ See eg *EC – Fasteners Appellate Body Report* par 277.

In addition, the Anti-Dumping Regulations provide as follows

- 8.14 In cases where the normal value needs to be determined as contemplated in section 32(4) of the Main Act, the Commission may determine the normal value of the products under consideration for the foreign producer or country in question on the basis of –
- (a) the normal value established for or in a third or surrogate country; or
 - (b) the costs and profits of and for the company in question, as listed in subsection 10, and as contemplated in accordance with subsection 15.
- 8.15 In cases where the Commission determines the normal value as contemplated in subsection 14(b), such cost inputs shall be accorded the market related cost of the different inputs, whether determined in that country or in a third or surrogate country.
- 8.16 Where the SACU industry in filing an application substantiates an allegation that section 32(4) of the Main Act applies to the application, it may submit normal value information contemplated in subsection 14 and 15 in support of its application.

ITAC's 'Anti-Dumping Application Questionnaire' requires the applicant to select a 'third or surrogate' country where the level of development is comparable to that in the non-market economy country, and to provide reasons for the selection.¹⁵ The questionnaire does not require the applicant to submit any proof of non-market economy behaviour in support of the application.

In 2006 South Africa signed a Memorandum of Understanding (MoU) with China covering, inter alia, anti-dumping investigations. Article 3 of the MoU provides as follows

- (1) The Parties agree to enhance dialogue on anti-dumping investigations, grant equal treatment to enterprises from both sides, and address differences through consultation.
- (2) For purposes of Article 3(1), the Parties shall sign the Record of Understanding on Anti-dumping Investigation to (a) implement South Africa's commitment to recognize China as a market economy; and (b) establish a mechanism of cooperation between the Parties' anti-dumping investigation authorities.

¹⁵ Question E1.4 of the Application Questionnaire, available at: http://www.itac.org.za/docs_page.asp?dID=37&cID=1&scID=8 (last accessed 6 July 2013).

The MoU has been accepted as part of South Africa's municipal law.¹⁶ Shortly after signing the MoU, South Africa also signed a Record of Understanding (RoU) with China which provides that China will be treated as a market economy in anti-dumping investigations, and sets out the procedure to be followed in anti-dumping investigations. The RoU provides, under the heading 'Initiation', that

In instances where information on domestic selling prices in China is not reasonably available to the SACU industries or the SACU industries is (sic) unable to determine whether prices are comparable to prices in the ordinary course of trade, it is necessary to allow SACU industries to use alternative methods, which are permitted by the WTO, of determining a normal value in China for the subject product for purposes of initiation of an investigation.

It continues, under the heading 'Preliminary and final phases', to provide that after initiation, Chinese exporters will be given the opportunity to provide information on domestic selling prices and cost of production of the subject product. ITAC will verify this information to establish whether sales made were in the ordinary course of trade.

The questionnaires given to Chinese companies will not differ from those given to all other countries.

Having set out the legislative provisions, it is important to examine specific findings on the basis of these provisions, and to determine how review of these cases has affected anti-dumping investigations against China.

WTO: EC – FASTENERS¹⁷

Basic facts of the case

The European Commission (EC) initiated an anti-dumping investigation against the alleged dumping of fasteners from China on the basis that the industry in China was operating under non-market conditions. Several exporters responded to the EC's questionnaires and supplied information to show that they were operating under market conditions, as well as

¹⁶ See *SATMC v ITAC* Unreported case 45302/2007 NG par 25.

¹⁷ *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* WT/DS397/AB/R, adopted 28 July 2011 (Appellate Body Report); and *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* WT/DS397/R, adopted 28 July 2011 (Panel Report, as modified by the Appellate Body report) (hereafter *EC – Fasteners Panel Report*).

information on normal value and export prices. The EC found that some of the exporters met the requirements for market economy status and determined the margin of dumping for those exporters on the basis of a direct comparison between their normal values and their export prices. In respect of certain of the remaining exporters, the EC found that they met the standard for 'individual treatment', but not for operating under market conditions, and applied to those exporters their own export prices, but determined their normal value on the basis of a surrogate country. For the remaining exporters, the EC found that they did not meet the requirements for either market economy status or individual treatment, and determined their margins of dumping on the basis of a comparison between the surrogate country normal value and a single export price for the whole of China, arguing that all these parties were related parties (in the sense of being government controlled) and therefore an economic entity.¹⁸

Arguments by China

Although several different arguments were raised and findings made, pertinent to the discussion here is that China argued that the EC's methodology was flawed insofar as it failed to determine individual margins of dumping for each exporter.¹⁹ It argued further that 'by subjecting the assignment of individual duty rates to the fulfilment of certain conditions, article 9(5) of the Basic [EU] AD Regulation violates article 9.2 of the AD Agreement'.²⁰

China specifically argued that the EU ADR was inconsistent with the AD Agreement for two reasons: dumping margins calculated for non-sampled producers would reflect the weighted average of the margins calculated for the sampled producers which may include margins determined for companies that were not granted individual treatment;²¹ and it violates exporters' right to request individual margins by imposing conditions contrary to the requirements of article 9.4 of the ADA.²² China also argued that the EC's requirement 'that exporting producers from NMEs are subject to a country-wide dumping margin unless they are able to demonstrate that they meet the five criteria of article 9(5) [of the EU ADR] ... violates article 6.10' of the

¹⁸ *EC – Fasteners Panel Report* par 7.79 and 7.80.

¹⁹ *Id* at par 7.51.

²⁰ *Id* at par 7.52.

²¹ *Id* at par 7.53. See also *EC – Fasteners Appellate Body Report* par 282.

²² *EC – Fasteners Panel Report* par 7.54.

ADA.²³ China challenged not only the EC's procedures in the fasteners investigation but also the EU's ADR 'as such'.²⁴

Arguments by the EU

The EU argued that the obligation contained in the first sentence of article 6.10 of the ADA, which requires the determination of an individual margin of dumping for each exporter, is 'purely procedural' and does not indicate how such calculation should be made.²⁵ It therefore argued that as the assignment and imposition of anti-dumping duties are addressed under article 9 of the ADA, China's arguments fell outside the scope of article 6.10 of the ADA and were therefore not properly before the Panel for review.²⁶ The EU further argued that article 9.2 of the ADA did not require an individual margin of dumping to be determined for each exporter, but only that the exporters must be 'named', while arguing in the alternative that article 9.2 allowed for the naming of the country as a whole where several exporters are involved and it is impractical to mention them all.²⁷

The EU further argued that despite the wording of article 6.10, sampling was not the only exception to the determination of individual duty rates, as multiple exporters which operate as a single entity could also be assigned a single anti-dumping duty.²⁸ Lastly, it argued that article 9(5) of the EU ADR addresses neither the calculation of dumping margins, nor the relationship between anti-dumping duties and dumping margins, nor the use of sampling, and therefore does not fall within the scope of articles 9.3 and 9.4 of the ADA. Accordingly, the EU claimed that as China's claims under articles 9.3 and 9.4 were dependent on its claims under articles 6.10 and 9.2, there could be no violation of articles 9.3 or 9.4.

Findings by the panel

In evaluating China's claims and the EU's counter arguments, the WTO panel first found that 'it is clear to us that there is a close and necessary link between the calculation of a margin of dumping and the imposition of an anti-dumping duty'.²⁹ It therefore rejected the EU's argument that the matter was not properly presented to the panel. The panel found that the EU's

²³ *Id* at par 7.51.

²⁴ *Ibid.*

²⁵ *EC – Fasteners Panel Report* par 7.55.

²⁶ *Ibid.*

²⁷ *Id* at par 7.57.

²⁸ *Id* at par 7.56.

²⁹ *EC – Fasteners Panel Report* par 7.72.

individual-treatment test is set out in article 9(5) of the EU ADR which provides that

Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims that:

- (a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
- (b) export prices and quantities, and conditions and terms of sale are freely determined;
- (c) the majority of the shares belong to private persons; state officials appearing on the board of directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;
- (d) exchange rate conversions are carried out at the market rate; and
- (e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.³⁰

The panel found that an exporter not granted individual treatment will be subject to a country-wide duty rate and that the export price will be determined bearing in mind the level of cooperation of all exporters not granted individual treatment. Therefore, if all, or virtually all, exporters cooperate, the export price will be determined on the basis of the weighted average export price from all parties. However, where the level of cooperation is low, the EU will rely on the ‘facts available’ to determine the export price.³¹

The panel considered that the EC ‘calculates one single dumping margin for NME producers that fail the IT test ... and imposes a single “country-wide” duty rate for those producers’.³² Following an analysis of article 6.10 of the ADA, the panel found that an individual margin of dumping had to be calculated ‘as a rule’ for each known exporter, and that this requirement may only be derogated from where sampling is applied, ie where there are too many exporters and only the information of certain exporters is considered (par 7.85). The panel concluded that article 9(5) of the EU ADR was not consistent with article 6.10 of the ADA ‘in that it conditions the calculation of individual margins for producers from NMEs on the fulfilment of the IT

³⁰ *Id* at par 7.49.

³¹ *Id* at par 7.50.

³² *Id* at par 7.81.

(individual treatment) test'.³³ The panel thus concluded that article 9.2 of the ADA did not allow the imposition of a single country-wide anti-dumping duty in an investigation involving an NME.

In essence, this meant that the EC's determination of all cases involving China was found wanting, and that its legislation was struck down as WTO-inconsistent. The EU appealed the panel's findings.

Findings of Appellate Body

The Appellate Body considered the wording of section 15 of China's Protocol of Accession and found that it does not authorise

WTO Members to treat China differently from other Members except for the determination of price comparability in respect of domestic prices and costs in China, which relates to the determination of normal value.³⁴

The Appellate Body explicitly stated that the Protocol of Accession did not contain an 'open-ended exception' which allows members to treat China differently for any purpose other than the normal value determination under the ADA.³⁵

The Appellate Body rejected the EU's contentions to the contrary and held that article 9.2 of the ADA contained a mandatory rule regarding the imposition of individual anti-dumping duties, ie that the anti-dumping duties be collected in appropriate amounts in each case and from each individual exporter under investigation.³⁶ It also found that article 9.2 required the specification of the level of anti-dumping duties for individual suppliers, unless the investigating authority applied sampling under article 9.5.³⁷ In this regard, and considering the relationship between the different exporters, it held that it is the investigating authority's responsibility to make an objective affirmative determination of the identity of the exporters and whether each exporter, individually, has 'a relationship with the State such that they can be considered as a single entity and receive a single dumping margin and a single anti-dumping duty'.³⁸

³³ *Id* at par 7.98.

³⁴ Appellate Body report, EC – Fasteners (China), par. 290.

³⁵ *Ibid.*

³⁶ *Id* at par 351.

³⁷ *Id* at par. 344.

³⁸ *Id* at par. 363.

Consequently, the Appellate Body concluded that although ‘there may be circumstances where exporters and producers from NMEs may be considered as a single entity for purposes of articles 6.10 and 9.2, such singularity cannot be presumed’ and that the authority must determine this on the basis of the information obtained during the course of an investigation.³⁹

After considering various conditions under which exporters could be regarded as being related, the Appellate Body found that where State actions materially influence ‘the behaviour of several exporters in respect of prices and output, they could be effectively regarded as one exporter’ for purposes of the ADA and that a single margin of dumping can be determined, and a single anti-dumping duty assigned, in such instances.⁴⁰

However, the Appellate Body found that this was not the purpose of the EC’s individual treatment test, and therefore that the EC could not regard all exporters in China as related or as a single economic entity simply by virtue of the fact that they operate in a non-market economy.⁴¹

The Appellate Body finally noted that even if it had correctly been determined that particular related exporters constitute a single supplier, articles 6.10 and 9.2 of the ADA would require an individual margin-of-dumping determination for the single entity, based on a comparison of the normal value in the surrogate country with ‘the average export prices of each individual exporter, and the imposition of a corresponding single anti-dumping duty’.⁴² This the EU does not do as a single country-wide margin and duty is calculated for all exporters that do not meet the individual treatment test or that do not cooperate.

The Appellate Body also considered whether in NMEs the state and exporters can be considered as a single entity for the purposes of articles 6.10 and 9.2 of the ADA⁴³ and noted an earlier panel finding on related parties.⁴⁴ However, in *Fasteners* the panel held that the individual treatment test in article 9(5) of the EC ADR did not involve the structural and commercial

³⁹ *Id* at par 364.

⁴⁰ *Id* at par 376.

⁴¹ *Ibid.*

⁴² *Id* at par 383.

⁴³ *Id* at par 371–384.

⁴⁴ *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R (Panel Report) adopted 28 November 2005 (hereinafter *Korea – Paper*) par 7.161.

relationship between distinct legal entities,⁴⁵ but rather the role of the state in how business is conducted in a member country.⁴⁶ Moreover, the panel found that the individual treatment test was not concerned with establishing whether the state was the ‘source of price discrimination’.⁴⁷ The Appellate Body concurred.⁴⁸ Interestingly, the Appellate Body presented a non-exhaustive list of situations ‘which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity’.⁴⁹ This list includes

- (i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management; (ii) the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and (iii) control or material influence by the State in respect of pricing and output.⁵⁰

By contrast, the Appellate Body found that the EC’s individual treatment test had ‘a different function’ and that it could not ‘be used to determine whether distinct exporters are sufficiently integrated with each other or with the State to constitute a single exporter’.⁵¹ Out of the five criteria in the individual treatment test, the Appellate Body found that only two ‘directly relate [...] to the structural relationship of the company with the State: the requirement that the majority of the shares belong to private persons and that the State officials holding management positions be in the minority’ and that ‘the State interference with prices and output’.⁵² All other criteria, rather, related to state interference with exporters or state intervention in the economy *in general* and were

likely to lead to the denial of individual treatment with respect to exporters that have little or no structural or commercial relationship with the State and whose pricing and output decisions are not interfered with by the State.⁵³

⁴⁵ See *Korea – Paper* par 7.168.

⁴⁶ *EC – Fasteners Panel Report* par 7.68–7.77.

⁴⁷ *Id* at par 7.75.

⁴⁸ *EC – Fasteners Appellate Body Report* par 380–382.

⁴⁹ *Id* at par 376.

⁵⁰ *Ibid.*

⁵¹ *Id* at par 377.

⁵² *Id* at par 378.

⁵³ *Ibid.*

Importantly, the Appellate Body noted that the test in *Korea – Paper* could not capture all situations in which the state effectively controls or materially influences and coordinates several exporters in a way that allows for them to be considered a single entity. When assessing whether the state and certain exporters constitute a single entity, in addition to the circumstances examined by the panel in *Korea – Paper*, an investigating authority must also consider all ‘factors and positive evidence’ that do not indicate a commercial relationship in the determination of whether any number of exporters constitute a single economic entity. Such information could include state control over pricing or output or other actions that would materially influence prices and costs.⁵⁴

For all of these reasons, the panel’s findings were upheld and the Appellate Body concluded that

only a dumping margin that is based on a weighted average of the export prices of each individual exporter that forms part of the single entity would be consistent with the obligation in Article 6.10 to determine an individual dumping margin for the single entity that is composed of several legally distinct exporters. We also do not consider that a country-wide duty imposed on a group of exporters could be considered as being ‘collected in the appropriate amounts in each case’ within the meaning of Article 9.2 of the Anti-Dumping Agreement, to the extent it is determined for the group of fully cooperating non-IT exporters on the basis of facts available because cooperating exporters account for significantly less than 100 per cent of all exports.⁵⁵

It follows that the EC’s regulations and procedures related to the determination of the export price for Chinese exporters were found wanting and had to be amended.⁵⁶ Accordingly, the EU amended article 9(5) of its ADR to provide that an individual anti-dumping duty will be imposed in each instance on a non-discriminatory basis. Only in cases where this is impracticable, will an anti-dumping duty be imposed on a country as a whole. However, different exporters may be regarded as a single economic entity and subject to a single anti-dumping duty if the underlying factors, including ‘the existence of structural or corporate links between the suppliers and the State or between suppliers, the control or material influence by the

⁵⁴ *Id* at par 381.

⁵⁵ *Id* at par 384.

⁵⁶ *Id* at par 385.

State in respect of pricing and output, or the economic structure of the supplying country' so require.⁵⁷

This therefore removes the requirement that exporters must meet certain criteria before their own export prices will be used in the determination of the margin of dumping.

RECENT EUROPEAN UNION CASE LAW

Zhejiang v Council; and Council v Zhejiang

Facts of the case

Xinan Chemical Industrial Group (Xinanchem), a listed Chinese company, produced and sold products including glyphosate, a basic herbicide, on the Chinese and international markets. Anti-dumping duties had originally been imposed in 1998⁵⁸ and were reviewed in 2003.⁵⁹ During the course of the sunset review, Xinanchem submitted information in support of its claim that it was operating under market conditions. The EC, however, rejected both this request and the alternative request for individual treatment⁶⁰ and treated the company as operating under non-market conditions on the basis that it was under state control. It consequently imposed a definitive duty of 29,9 percent.⁶¹ This finding was based exclusively on the fact that the EC found that the company did not meet the first criterion set in article 2(7)(c), even though it met all four other article 2(7)(c) criteria.⁶² Article 2(7) provides that

A claim under [Article 2(7)] (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

⁵⁷ <http://eur-lex.europa.eu/LexUriServ/-LexUriServ.do?uri=COM:2012:0041:FIN:EN:HTM> (last accessed 1 July 2013).

⁵⁸ See Regulation (EC) No 368/98, OJ 1998 L47/1.

⁵⁹ The combined sunset and interim review initiation notice was published in OJ 2003 C36/18.

⁶⁰ In terms of individual treatment (prior to the ruling in *EC – Fasteners* above), a company is subject to the normal value based on the analogue country's prices or costs, but its margin of dumping is determined on the basis of its own export prices. Where individual treatment is not granted, the margin of dumping may be determined on the basis of the average export price for all parties not granted market economy or individual treatment, if there is a high level of cooperation, or on the basis of the information contained in Eurostat, the official import statistics into the EU. See EC Anti-Dumping Regulation art 2(7).

⁶¹ Recitals 13–17 of Regulation 1683/2004, OJ 2004 L303/1; Case C337/09 P *Council v Zhejiang Xinan Chemical Industrial Group Co Ltd* Par 14, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=125218&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=338914> (last accessed 19 June 2013), not yet available in ECR (hereafter *Council v Zhejiang*).

⁶² *Council v Zhejiang* par 17 and 71.

- decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,
- firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,
- the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,
- the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and
- exchange rate conversions are carried out at the market rate.

Despite this, an individual anti-dumping duty will be applied to each exporter who can demonstrate that

- (a) in the case of wholly or partly foreign-owned companies or joint ventures, exporters are free to repatriate capital and profits;
- (b) export prices and quantities, and conditions of sale are freely determined;
- (c) the majority of the shares belong to private persons. State officials appearing on the board of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State intervention;
- (d) exchange rate conversions are carried out at the market rate; and
- (e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.⁶³

The findings of the court of first instance

The court of first instance (now the General Court⁶⁴) found that the EC and the Council of the European Union (Council) had confined themselves to the determination of whether state control existed on the basis of shareholding, rather than determining whether such control resulted in ‘significant State interference’. They had found that the exporter met all other criteria required under article 2(7)(c), as well as in the rest of article 2(7).⁶⁵ The court of first

⁶³ Article 9(5) of the EU Anti-Dumping Regulation. See also *Zhejiang v Council* par 7.

⁶⁴ See *Council v Zhejiang* par 1.

⁶⁵ Case T-498/04 *Zhejiang Xinan Chemical Industrial Group v Council* [2009] ECR II-1969 (hereinafter *Zhejiang v Council*) par 80–82.

instance also found that the wording in the first indent of article 2(7)(b)⁶⁶ made it clear that what had to be determined was not shareholding per se, but how ‘decisions ... regarding prices, costs and inputs’ are taken,⁶⁷ and whether such decisions are based on market economy conditions.⁶⁸ The court accordingly held that the Council and the EC were not entitled to reject the exporter’s submissions and requests purely on the basis of significant state control.⁶⁹

As regards the finding that the exporter also did not qualify for individual treatment, the court of first instance found that although all export documents had to be stamped by the China Chamber of Commerce Metals, Minerals and Chemicals Importers and Exporters (CCC MC) – a government institution – it was clear that this procedure was established by the exporters to ensure that they complied with anti-dumping regulations and that the prices were set by the exporters, rather than by the CCC MC.⁷⁰ The court therefore found that the Council and the EC had erred in its determination not to grant the exporter individual treatment. In this regard the court found, and the Court of Justice concurred, in Xinanchem’s favour not because the information it submitted showed that it met the burden of proof for the individual treatment criteria – but simply as the EC and the Council had failed to take this information into consideration.⁷¹

The appeal

⁶⁶ Recital 1 of Article 2.7(c) of the EU Anti-Dumping Regulation requires that ‘decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values’.

⁶⁷ *Id* at par 84–85.

⁶⁸ *Id* at par 88–92.

⁶⁹ *Id* at par 109. Note that the General Court did not express an opinion as to whether the information submitted by the exporter was sufficient to render a finding that it was operating under market conditions, *ie* it simply found that the information could not have been rejected, but it did not complete the analysis.

⁷⁰ *Id* at par 141–151.

⁷¹ *Id* at recital 157 and *Council v Zhejiang* par 103–105.

The Council appealed the verdict⁷² on the basis of the court's assessment of the exporter's shareholding; the CCCMC requirements for exports; and as the Council submitted that all of the factors for market economy treatment and individual treatment had to be evaluated concurrently and not separately. The Council submitted that the first indent of regulation 2(7)(c) required a producer to 'provide sufficient evidence to show that its decisions regarding prices, costs and inputs ... are taken in response to market signals reflecting supply and demand, and without significant State interference in that regard, and that costs of major inputs materially reflect market values'.⁷³ The Council therefore argued that the provision laid down a dual criterion: the producer must show both that its commercial decisions are made in terms of market economy principles and also that its raw material costs represent free market prices. As regards the first issue, the Council specifically argued that state control automatically indicates state intervention, as referred to in regulation 2(7)(c).

The Court of Justice, however, held that the court *a quo* was entitled to hold that control did not necessarily equate to interference, and that the Council and the EC had an 'obligation to take into account the evidence ... of the real factual, legal and economic context in which [the exporter] operates'.⁷⁴ Further, article 2(7)(c) was 'not directed at all types of State interference in producer undertakings, but only that concerning their decisions regarding prices, costs and inputs'.⁷⁵ In addition, it found that 'it is not sufficient that a State may have a certain amount of influence over those decisions', but that there has to be significant 'actual interference'.⁷⁶ In this regard the court held that 'State interference that is neither by its nature nor effect capable of rendering a producer's decisions regarding prices, costs and inputs incompatible with market economy conditions cannot be considered significant'.⁷⁷ Although the Court of Justice found that 'the fact that a

⁷² Note that the anti-dumping duty in question had lapsed at the time of the appeal. However, the Council proceeded with the review on the basis that if the Court of First Instance's verdict was upheld, it would mean that all duties paid on products imported from Xinanchem would have to be refunded from the date of the original imposition following the first sunset review, whereas if the verdict was overturned the duty would be applicable until the date it was withdrawn for all exporters; and on the basis that the issues under appeal were important for interpreting the meaning of art 2(7) of the Basic Regulation.

⁷³ *Council v Zhejiang* par 72.

⁷⁴ *Id* at par 78.

⁷⁵ *Id* at par 79.

⁷⁶ *Id* at par 80 and 89.

⁷⁷ *Id* at par 82.

company established ... is *de facto* controlled by State shareholders raises serious doubts as to whether the company's management is sufficiently independent of the State to be able to take decisions regarding prices, costs and inputs autonomously and in response to market signals',⁷⁸ and that '[e]ven where a producer has taken decisions in response only to market signals, the criterion in question precludes granting it [market economy status] in the event that the State has significantly interfered with the operation of market forces',⁷⁹ it found that the Council and the EC had failed to determine whether the control transformed itself into intervention. The Court of Justice did confirm that the burden of proof remained on the exporter, ie the exporter must prove that its cost, pricing, input, sales and investment decisions were taken in response to market supply and demand *and* that such prices are representative of free market principles.⁸⁰

The Court of Justice noted that although the Council and Commission need not prove significant state interference, they must 'examine with all due care and impartiality, the evidence provided by the producer and ... take due account of all relevant evidence when assessing the effects ... on that producer's decisions concerning export prices'.⁸¹

It found that the court of first instance had not held that it was for the EC and the Council to prove government intervention, 'but only that they failed to carry out an assessment of [the exporter's] evidence in accordance with their obligations'. It agreed with the court of first instance,⁸² and concluded that the EC and Council retained significant discretion in the determination of market economy status and that 'if any doubt remains as regards the question whether the criteria set out in article 2(7)(c) of the basic regulation are satisfied, [market economy treatment] cannot be granted'.⁸³

The effect of the judgment has been that the EC cannot simply regard parties as operating under non-market conditions based exclusively on significant government shareholding in a company, but that it must specifically determine whether the effect of such government shareholding is of a nature

⁷⁸ *Id* at par 86.

⁷⁹ *Id* at par 90.

⁸⁰ *Id* at par 91.

⁸¹ *Id* at par 104.

⁸² See *Zhejiang v Council* par 36.

⁸³ *Council v Zhejiang* par 106.

that ‘significantly’ affects the behaviour of the company as regards its decisions on prices, costs, output, sales, and investment.⁸⁴

Brosmann v the Council⁸⁵

Facts of the case

In 2005 the EC initiated an investigation into the alleged dumping of footwear from China.⁸⁶ As the investigation involved a large number of exporters, the EC elected to apply sampling. A total of 154 exporters indicated their willingness to be included in the sample.⁸⁷ Of these, the EC decided to include thirteen Chinese exporting producers representing more than 20 percent of the Chinese export volume to the EU.⁸⁸ In determining the sample, the EC took into consideration: (a) the exporter’s volume of exports to the EU; and (b) its size in terms of domestic sales.⁸⁹ The EC indicated that the methodology applied was intended to ensure the highest possible representativity of the samples and to include the largest representative volume of exports that could reasonably be investigated, while also including companies with representative domestic sales.⁹⁰ One exporter included in the sample failed to cooperate, reducing the sample to twelve exporters’ investigation. Certain products were also excluded from the scope of the investigation.⁹¹ The EC indicated that article 9(6) of the ECR would be applied in respect of all exporters that indicated that they would be willing to be included in the sample, but had not been selected.⁹² Article 9(6) provides

[A]ny anti-dumping duty applied to imports from exporters or producers which have made themselves known ... but were not included in the examination shall not exceed the weighted average margin of dumping established for the parties in the sample. For the purpose of this paragraph, the Commission shall disregard any zero and de minimis margins, and margins established in the circumstances referred to in Article 18. Individual duties shall be applied to imports from any exporter or producer which is granted individual treatment, as provided for in Article 17.

⁸⁴ See also De Baere n 1 above.

⁸⁵ *Case T-401/06 Brosmann Footwear (HK) Ltd and Others v Council of the European Union*, not yet available in ECR (hereinafter *Brosmann v Council* (CFI)).

⁸⁶ See OJ 2005 C/166, 14 (7 July 2005) (initiation).

⁸⁷ Regulation (EC) No 553/2006 OJ 2006 L/98, 3 (23 March 2006) (preliminary) recital 55.

⁸⁸ *Id* recital 57.

⁸⁹ *Id* at recital 59.

⁹⁰ *Id* at recital 46.

⁹¹ *Id* at recital 63.

⁹² *Id* at recital 62.

The dumping margin for exporters not included in the sample was determined on the basis of the weighted average of the dumping margins of the companies in the sample.⁹³ Several exporters not included in the sample requested to be treated as operating under market economy conditions and, therefore, that their own domestic costs and sales information and export prices be used to determine their margins of dumping. The EC rejected these claims as it could not take the information of so many exporters into consideration, and also could not determine the individual market economy status of each country that requested this or determine an individual margin of dumping for each of those companies. It therefore determined their margin of dumping on the basis of the weighted average margin of dumping determined in terms of article 9(6), regardless of whether the companies in the sample were accorded market economy status, individual treatment, or neither.⁹⁴

On 5 October 2006 it imposed a definitive anti-dumping duty of 29,9 percent on all exporters not included in the sample.⁹⁵

The findings of the court of first instance

In *Brosmann v Council*, the applicants raised eight pleas,⁹⁶ only some of which are relevant to this discussion. The applicants challenged, inter alia, the fact that the EC had failed to determine an individual margin of dumping for each of them and had assigned to them the weighted average margin of dumping determined for the sample, despite the applicants having submitted not only normal value and export price information, but also information to show that they were operating under market conditions.⁹⁷ As the first two pleas both concerned the EC's refusal to grant the applicants either market economy or individual treatment, the court examined these two pleas

⁹³ *Id* at recitals 135 and 143.

⁹⁴ Council Regulation (EC) No 1472/2006 OJ 2006 L 275, 1 (5 October 2006) (final) recitals 60–65.

⁹⁵ Council Regulation (EC) No 1472/2006 OJ 2006 L 275, 1 (5 October 2006).

⁹⁶ The issues raised were: breach of Article 2(7)(b) and Article 9(5) of the basic regulation and breach of the principles of equal treatment and protection of legitimate expectations; breach of Article 2(7)(c) and Article 18 of the basic regulation and breach of the rights of the defence; manifest error of assessment and breach of Article 5(4) of the basic regulation; manifest error of assessment and breach of Article 1(4) and Articles 2 and 3 of the basic regulation; manifest error of assessment and breach of Article 17 of the basic regulation and of Article 253 EC; manifest error of assessment and breach of Article 3(2) of the basic regulation and of Article 253 EC; manifest error of assessment and breach of Article 3(2) of the basic regulation; and manifest error of assessment and breach of Article 9(4) of the basic regulation. See *Brosmann v Council* (CFI) par 57.

⁹⁷ *Id* at par 58.

together.⁹⁸ The applicants claimed that the EC erred by examining only the market economy treatment and individual treatment claims of companies included in the sample, and that this violated articles 2(7) and 9(5) of the EU ADR⁹⁹ as these articles could only be applied on an individual basis in that they entail a consideration of the individual characteristics of each exporter concerned.¹⁰⁰ In addition, the applicants claimed that the EC had breached article 18(3) and (4), which provide that the EC had to take into consideration information provided by interested parties even if the information was not ideal in all respects, and that the EC had to inform parties whose information was rejected and give them the opportunity to provide further explanations. The EC only responded to the applicants' submissions in this regard in the final disclosure document, where it rejected the consideration of market economy or individual treatment on the basis of the unprecedented number of claims received in this regard.¹⁰¹ The applicants further argued that as the EC was aware of the number of claims at an early stage in the investigation, there was no basis for it not informing the applicants immediately of its decision to disregard the information.¹⁰²

The court of first instance found that article 17(1) and (3) of the EC ADR constituted a limitation of the investigation that had to comply with two obligations: the sample had to be representative; and the margin of dumping for exporters not included in the sample could not exceed the weighted average margin of dumping established for the parties in the sample.¹⁰³ It further held that although article 9(6), read in conjunction with article 17(3), gave each exporter not included in the sample the right to request the determination of an individual margin of dumping, this right was subject to the ability of the EC to process all such requests.¹⁰⁴ The court therefore held that exporters did not have an 'unconditional right' to the calculation of an individual dumping margin.¹⁰⁵ The court further held that as the determination of market economy or individual treatment only related to the methodology used to determine the margin of dumping, the EC was not required to make such a determination in respect of exporters not included

⁹⁸ *Ibid.*

⁹⁹ *Id* at par 59.

¹⁰⁰ *Id* at par 61.

¹⁰¹ *Id* at par 68.

¹⁰² *Ibid.*

¹⁰³ *Id* at par 72–73.

¹⁰⁴ *Id* at par 74–76.

¹⁰⁵ *Id* at par 77.

in the sample where this would place an undue burden on the EC.¹⁰⁶ On the basis that 141 exporters outside of the sample had requested market economy or individual treatment, the court held that ‘the Commission was right to find that the number of claims was manifestly too high to enable them to be examined without compromising the completion of the investigation in good time.’¹⁰⁷ The court therefore rejected the application.¹⁰⁸

The appeal

The applicants appealed the court of first instance’s verdict on nine grounds, including that it had: (i) committed ‘an error of law concerning the application of articles 2(7) and 9(5) of the basic regulation, (ii) an error of law concerning the application of article 2(7)(c) of the basic regulation and a failure to provide reasons with regard to the three-month time-limit as applied to the MET/IT claims of the Chinese producers included in the sample, [and] (iii) an error of law concerning the application of that article 2(7)(c) in relation to that time-limit as applied to the appellants’ MET/IT claims’.¹⁰⁹ The ECJ considered these three grounds of appeal together.¹¹⁰

The applicants again contended that there was an absolute requirement that the EC determine whether they were operating under market economy conditions or whether they should be accorded individual treatment, regardless of whether they were included in the sample or not. Further, if they were granted either market economy or individual treatment, their margins of dumping should have been determined in accordance with the exporters included in the sample that had been accorded the same status.¹¹¹

The ECJ noted that although article 2(7)(a) provides that the general rule relating to non-market economies was that the normal value would be determined on the basis of the normal value established in an analogue country, the normal value for a particular exporter had to be determined in accordance with article 2(1) to (6) if that exporter could show that it was

¹⁰⁶ *Id* at par 78.

¹⁰⁷ *Id* at par 84.

¹⁰⁸ *Id* at par 98.

¹⁰⁹ Case C-249/10 P, *Brosmann Footwear (HK) Ltd and Others v Council of the European Union*, par 21, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=119009&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=339480> (last accessed 18 June 2013).

¹¹⁰ *Id* at par 22.

¹¹¹ *Id* at par 23.

operating under market conditions.¹¹² The burden of proof establishing that market economy conditions prevailed falls to the exporter making such claim.¹¹³ The ECJ noted that the court of first instance had held that ‘that the Commission was not required to examine MET/IT claims from traders who are not included in the sample, where it has concluded, in applying article 17(3) of the basic regulation, that the calculation of individual dumping margins would be unduly burdensome and would prevent it from completing the investigation in good time’.¹¹⁴ The ECJ, however, held that the court *a quo* had erred as

Article 2(7) of the basic regulation is one of the provisions ... concerned solely with the determination of normal value, whereas Article 17 of that regulation – on sampling – is one of the provisions relating, *inter alia*, to the methods available for determining the dumping margin. Thus, the provisions differ in content and purpose.¹¹⁵

The ECJ further held that article 2(7)(b) of the EC ADR laid an ‘obligation’ on the EC to determine the normal value on the basis of the exporter’s own information where such exporter could show it was operating under market conditions, and that this obligation was not affected by the methodology used to determine the margin of dumping.¹¹⁶ The ECJ, therefore, upheld the appeal to the extent that the EC was required to consider the market economy or individual treatment of each of the applicants.¹¹⁷

Effect of the verdicts

The question considered in *Zhejiang* as to whether a company’s request for individual treatment can be rejected, has become moot in light of the Appellate Body’s finding that China’s Protocol of Accession to the WTO does not allow for any derogation from the determination of the export price. Accordingly, in all future anti-dumping investigations the EC conducts against Chinese companies, it will have to determine individual margins of dumping for each cooperating company, unless it can specifically prove that two or more of those companies are related and acting as a single economic entity.

¹¹² *Id* at par 30–31.

¹¹³ *Id* at par 32.

¹¹⁴ *Id* at par 35.

¹¹⁵ *Id* at par 37.

¹¹⁶ *Id* at par 38.

¹¹⁷ *Id* at par 40–43.

The effect of this finding is that the Commission will have to conduct more intensive investigations, as it will now have to consider the export price information, and adjustments related to such export prices, for each individual cooperating company. Companies that have exported at higher prices will therefore be accorded lower margins of dumping or may be found not to have dumped. In general, in all likelihood it means that cooperating exporters that were not accorded full market economy status will receive lower levels of anti-dumping duties than would have applied before the Appellate Body and ECJ findings.

In addition, the combined effect of the Appellate Body decision and the two recent ECJ judgments, is that the EC must consider each exporter's request for market economy treatment, and that it cannot apply the weighted average margin of dumping determined in a sample to exporters that did not have the same (market economy or non-market economy) status as the exporters included in the sample.

These changes will directly impact the margins of dumping found in respect of Chinese exporters and will tend to lower these margins significantly resulting in less protection for the EU industry and greater access to the EU market for Chinese exporters.

RECENT CASE LAW IN SOUTH AFRICA: *SATMC V ITAC*¹¹⁸ AND *ITAC V SATMC*¹¹⁹

Background

The South African Tyre Manufacturers' Conference (SATMC) lodged an application with the International Trade Administration Commission (ITAC) for the imposition of anti-dumping duties on passenger car tyres and both light and heavy commercial vehicle tyres in South Africa imported from China, which caused material injury to the South African industry. It indicated in its application that the companies in China were operating under NME conditions and supplied normal values in Chinese Taipei as surrogate for China, without providing any substantiation in this regard.

¹¹⁸ South African Tyre Manufacturers' Conference (SATMC) v International Trade Administration Commission (ITAC) Unreported case 45302/2007 NG (hereafter *SATMC v ITAC*).

¹¹⁹ International Trade Administration Commission (ITAC) v South African Tyre Manufacturers' Conference (SATMC) [2011] ZASCA 137 (hereafter *ITAC v SATMC*).

ITAC initiated the investigation on 28 October 2005¹²⁰ on the basis of a comparison between the normal value in Chinese Taipei and the export price from China, thereby confirming that the investigation was initiated on the basis of section 32(4) of the ITA Act, which specifically provides for the determination of the normal value for NMEs. During the course of the investigation, the SATMC submitted information showing that the tyre industry in China was operating under non-market conditions, including up-to-date information specific to some of the cooperating exporters.¹²¹ None of the cooperating exporters submitted comments on the allegation that they were operating under non-market conditions, or information to rebut the allegations. While the investigation was underway, South Africa signed a Memorandum of Understanding (MoU) with China in terms of which China was granted market economy status, indicating that a record of understanding would be signed between the countries to give effect to this provision. On 18 September 2006 ITAC signed an RoU with MOFCOM, its counterpart in China. This provided that investigations could still be initiated on the basis of a third country normal value, but where Chinese exporters would receive the opportunity to prove that they were operating under market conditions. Whilst the MoU has become part of South African municipal law after promulgation,¹²² the RoU does not conform to the requirements of an international agreement¹²³ and does not form part of municipal law. ITAC also conceded as much in *SATMC v ITAC*.¹²⁴

ITAC, in its final report on its findings, did not refer to any of the applicant's information on the non-market economy status of the exporters or address the issues at all. It simply considered whether domestic sales in China were made in the ordinary course of trade (note that the SATMC also challenged ITAC's findings in this regard before the High Court, but that this was never ruled on – see the SATMC's founding and replying affidavits), and determined the margin of dumping by comparing the companies' respective domestic and export prices. Since ITAC did not consider the NME status of the cooperating exporters; as the record clearly shows that ITAC had made

¹²⁰ Notice 1913 in Government Gazette No. 28150 on 28 October 2005.

¹²¹ See the public file of the investigation. ITAC's application questionnaire (question D3) does not require that such substantiating information be submitted as part of the application, but only that the allegation of non-market economy status be made, along with a selection of the third country to be used.

¹²² See Part 5 of Schedule 10 to the Customs and Excise Act, 91 of 1964.

¹²³ The understanding was signed by government institutions, rather than by the relevant Ministers and indicates that it is a 'best endeavours' agreement.

¹²⁴ *SATMC v ITAC* par 25.

serious errors in its ordinary course of trade finding in that several parties made significant sales at prices below cost and there were considerable dealings between related parties; and as it made adjustments decreasing the normal value, and thus the margin of dumping, in violation of its enabling legislation.¹²⁵ It also failed to make the requisite adjustments to the export price, thus further decreasing the margin of dumping. In sum, the ITAC found that none of the six cooperating exporters dumped the product in South Africa. It also found that the remaining imports from China – which it found had been dumped – could not be the cause of material injury. It consequently terminated the investigation.

The SATMC lodged a judicial review of the matter before the High Court.

SATMC v ITAC

Before the High Court the SATMC argued that ITAC

- was wrong to treat the cooperating exporters as operating under market conditions;
- applied an irrational methodology in determining the normal value in cases where specific models were not sold on the domestic market;
- incorrectly determined that the exporters' domestic sales were made in the ordinary course of trade;
- should have found a causal link between the dumping found and the industry's injury;
- incorrectly determined the volume of dumped imports;
- granted adjustments to the normal value that should not have been made;
- failed to make adjustments to the export prices that should have been made; and
- was biased in that it accepted incomplete responses from exporters, accepted inadequate non-confidential submissions from them, and accepted their late submissions.¹²⁶

ITAC argued that there was no duty on it to investigate whether the exporters were operating under non-market conditions,¹²⁷ as it only had to determine a third country normal value once it had found that sales were made under

¹²⁵ See the requirements listed in Regulation 11.2 before an adjustment may be made to the normal value. See also *SATMC v ITAC* par 14 for the issues raised before court.

¹²⁶ *SATMC v ITAC* par 14 and the SATMC's founding and replying affidavits.

¹²⁷ *Id* at par 31.

non-market conditions and as it would then still have discretion to use domestic sales.¹²⁸ Hartzenberg J, however, held that

The most important aspect of ITAC's investigation was to determine whether the economy of the exporting country is a free market economy or not. *Only if the conclusion was that it was a free market economy the next step in the exercise would have been to determine what the normal price in the ordinary course of trade business [is]...*¹²⁹

He also held that where ITAC wished to rely on domestic prices despite proof of government intervention, it would have to make adjustments to the normal value to address these differences.¹³⁰ Finally, Hartzenberg J held that ITAC had a legal duty to investigate fully whether the cooperating exporters were conducting trade under market conditions. Where interested parties had submitted information in this regard, ITAC had a duty properly to investigate that information. He concluded that ITAC's refusal to investigate the issue of market economy status enabled it to reach a finding of no dumping by the cooperating exporters.¹³¹ This had a major impact on the question of whether dumping from China caused the industry's injury. Hartzenberg J, however, failed to rule on any of the other issues raised before him.

ITAC v SATMC

ITAC appealed the High Court decision on the basis that it had no duty to consider whether the Chinese exporters were operating under non-market conditions and the fact that even if it had so found, it would still have a discretion to use Chinese domestic prices for the determination of the normal value.

The Supreme Court of Appeal (SCA), speaking through Harms AP, started by confirming that South Africa was a founding member of the WTO and a signatory to the GATT.¹³² Harms AP held that any international agreement

¹²⁸ *Id* at par 20.

¹²⁹ *Id* par 22 (own emphasis).

¹³⁰ *Id* at par 23.

¹³¹ In addressing causal link Hartzenberg J at par 34 held that 'As a result of the first respondent's refusal to investigate the question of government intervention *it was able to conclude* that the participating respondents did not dump. That had quite a dramatic effect on the percentage of undumped imports from the PRC.' (Emphasis added.)

¹³² *ITAC v SATMC* par 6, quoting with approval from *Progress Office Machines v SARS* 2008 2 SA 13 (SCA) par 5 (footnotes omitted). Note that although the full text of GATT 1947 was published in the Gazette, it was never incorporated into South African municipal law. See Brink (2004) *A Theoretical Framework for South African Anti-Dumping Law* (LLD thesis, University of Pretoria) 33–34. See also Eisenberg 19 *SAYIL*

becomes law in South Africa when it is enacted by national legislation, and that the promulgation of the ITA Act was indicative of an intention to give effect to the provisions of the GATT and the AD Agreement¹³³ – although the text to be interpreted remains the South African.¹³⁴

The SCA confirmed that the South African legislation ‘find [its] antecedents in the WTO instruments’¹³⁵ but indicated that ‘the Act does not replicate [the international provisions] in all respects’.¹³⁶ Harms AP went on to find that ‘it has not been suggested that they affect their clear meaning. The interpretational duty imposed by s 233 of the Constitution accordingly has no material bearing on this case.’¹³⁷ As regards China’s Protocol of Accession to the WTO, the judge went on to find that

the manufacturers, quite rightly, accepted during argument that although South Africa was entitled to adopt the advantages of the Protocol through legislation, it has not done so; and even if South Africa were a party to the Protocol, *which it is not*, private parties cannot derive any rights from it. As Malan AJA said, no rights are derived from international agreements themselves. And since *the Protocol is not part of international law*, the ITA Act and regulations cannot be interpreted with reference thereto under s 233 of the Constitution.¹³⁸

This finding is at odds with international law. First, although it is correct that legislation would have to be adopted to give internal effect to the China

132, who quotes the Chief State Law Advisor as indicating that ‘[t]he application of GATT by South Africa was . . . made contingent upon subsequent regulations . . . No such regulations were ever made; consequently no date for the application of GATT has been determined and in our opinion it has never formed part of the domestic law and thus its provisions can not be invoked before national courts by the subject . . .’.

¹³³ Note that this statement is debatable, as it would appear strange to only legislate for these requirements 8 years after the WTO came into force. It also disregards the *Board on Tariffs and Trade Amendment Act 1995* and the *Board on Tariffs and Trade Amendment Act 1997*, both of which were adopted to give effect to South Africa’s international obligations under the WTO Agreement.

¹³⁴ *ITAC v SATMC* par 7, quoting with approval from *Progress Office Machines v SARS* par 6.

¹³⁵ *Id* at par 12. Strictly speaking this is incorrect, as South Africa’s anti-dumping legislation, which dates back to s 8 of the Customs Tariff Act 26 of 1914, predates not only the WTO Agreement but also the General Agreement on Tariffs and Trade 1947.

¹³⁶ *Ibid.*

¹³⁷ *ITAC v SATMC* par 16. Note, however, that argument had been led in this regard by both parties. It is submitted, however, that *strictu sensu* the finding is still incorrect, as South African law should be interpreted in line with international law, of which WTO law forms part.

¹³⁸ *ITAC v SATMC* par 18 (emphasis added).

Protocol, South Africa, as a member of the WTO that signed the Protocol of Accession with China, did obtain rights in terms of the Protocol, was in a position to utilise its provisions, and had in fact done so from 2001 to 2005. Therefore, contrary to Harms AP's finding, South Africa *is* a party to the Protocol. Second, it is submitted that as the Protocol, even though only signed in 2001, has been incorporated into and forms part of the overall WTO Agreement, Harms AP is incorrect in holding that the Protocol does not form part of international law. If this were the case, the WTO Agreement itself should also be regarded as not forming part of international law as the WTO Agreement specifies that any 'accession shall apply to this Agreement and the Multilateral Trade Agreement attached thereto'.¹³⁹ It also provides that '[d]ecisions on accession shall be taken by the Ministerial Conference',¹⁴⁰ – of which South Africa is a part – and that the Ministerial Conference, which included South Africa's participation, 'shall approve the agreement on the terms of accession'.¹⁴¹ Accordingly, it is submitted that Harms AP's finding that the Protocol cannot offer guidance on the interpretation of the ITA Act and the regulations, cannot hold water. It should further be noted that the manufacturers, at no point, argued that they 'accepted' that they derived no rights under the Protocol.¹⁴²

In analysing the options open to ITAC to determine the normal value, Harms AP then erred once more in both law and fact, when he held that the industry

found that exports to our country or common customs area cost appreciably less than *exports to the surrogate country* and they then calculated the dumping margin for different types of tyres.¹⁴³

This would refer to the normal-value methodology on the basis of exports to a third country,¹⁴⁴ whereas industry relied on, and the investigation was

¹³⁹ Art XII.1 of the WTO Agreement.

¹⁴⁰ Art XII.2 of the WTO Agreement.

¹⁴¹ *Ibid.*

¹⁴² This falls within the author's personal knowledge, having been present in the SCA hearing.

¹⁴³ *ITAC v SATMC* par 19 (emphasis added).

¹⁴⁴ Section 32(2)(b)(ii)(bb) of the ITA Act provides as follows: 'For the purpose of considering an application alleging the dumping ... of goods into the Common Customs Area 'normal value', in respect of any goods, means ... in the absence of information on a price contemplated in subparagraph (ii) ... the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative.'

initiated on the basis of, the normal value *in* a third or surrogate country.¹⁴⁵ It appears that the SCA failed to appreciate the very significant difference between these two provisions. This is confirmed by Harms AP's statement that 'the information provided to [ITAC] could also have been the basis for a determination under the second alternative under s 32(2)'.¹⁴⁶ This is a factual impossibility, as the only normal value information provided by industry related to prices 'in' (and not 'to') the third country, ie prices in the Taiwanese domestic market, with no information having been supplied on Chinese export prices to Taiwan. This incorrect interpretation lies at the heart of an entirely incorrect verdict.

Harms AP further indicated that the industry

did not allege that the normal value of the goods in question was not determined according to free market principles as a result of government intervention in the exporting country or country of origin, and no facts were set out in the submission which could support such a conclusion.¹⁴⁷

This misconstrues the burden placed on industry and implies a higher burden for industry than that envisaged in ITAC's own questionnaires. The latter do not require supporting documentation, but only that the industry indicate whether it is 'of the opinion' that exporters are operating under non-market conditions. If this is indeed the case, the industry must nominate a third country and provide reasons for the nomination.¹⁴⁸ Harms AP's findings also negate all the information that the industry submitted in this regard during the course of the investigation and which, as a reading of ITAC's final report shows, was never taken into consideration by it or by the SCA – notwithstanding Harms AP's quoting a summary of the very information submitted by the industry in this regard in the High Court judgment.¹⁴⁹ On the basis of this reasoning, the SCA then reached the conclusion that

[t]he manufacturers' case, accordingly, was based on the assumption that, because of the China Protocol, they had certain rights and ITAC had duties not reflected in the Act or regulations, and the exporters carried an onus to

¹⁴⁵ Section 32(4) provides as follows: 'If the Commission, when evaluating an application concerning dumping, concludes that the normal value of the goods in question is, as a result of government intervention in the exporting country or country of origin, not determined according to free market principles, the Commission may apply to those goods a normal value of the goods, established in respect of a third or surrogate country.'

¹⁴⁶ *ITAC v SATMC* par 22.

¹⁴⁷ *Id* at par 20.

¹⁴⁸ Question D3 of ITAC's Anti-Dumping Application Questionnaire.

¹⁴⁹ *ITAC v SATMC* par 25–26.

prove that the PRC has a market economy. As already mentioned, this assumption was wrong. There is also no onus under the ITA Act ...¹⁵⁰

It is not clear how the SCA reached this conclusion as it was never submitted that ITAC had to conduct its investigation on the basis of the Protocol. There is also nothing in the record on which it could base this conclusion. On the contrary, the application made it clear that the investigation had to be conducted on the basis of the normal value established in a third or surrogate country as per section 32(4) of the ITA Act. Further, to find that ITAC had no onus under the ITA Act is an error in both fact and law. The SCA acknowledged that a conclusion had to be reached on the basis of the facts at ITAC's disposal, yet in essence it found that it was not required to consider any of the information submitted by the industry showing that the exporters were operating under non-market conditions. It then indicated¹⁵¹ that the 'section nowhere requires any investigation into the question whether the exporting country has a free market economy or not'.

Article VI Annex par 2 of GATT is instructive (emphasis added):

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.' (Emphasis in original.)

These contradictory findings simply do not make sense: section 32 provides different methodologies for determining the normal value – including the values established in a third country. Harms AP correctly holds that the Commission must base its investigation on the facts at its disposal. The investigation was initiated on the basis of normal values in a third country – that is, that China was treated as an NME. Facts were placed before ITAC to substantiate that specific exporters were not operating under market conditions. Logic dictates that these facts should have been investigated, yet Harms AP ruled that ITAC had no obligation in this regard. In addition, Harms AP correctly held that the 'text to be interpreted ... remains the South African legislation.'¹⁵² The reference to the second note to article VI.2 of the GATT is, therefore, misplaced, especially considering that this note was neither included in the GATT Act¹⁵³ promulgated in South Africa, nor

¹⁵⁰ *Id* at par 27.

¹⁵¹ *Id* at par 33.

¹⁵² *Id* at par 7.

¹⁵³ General Agreement on Tariffs and Trade Act 29 of 1948.

incorporated in the ITA Act. The fact that it was *not* incorporated in the ITA Act – which the SCA held was reflective of South Africa’s intention to give effect to its obligations under the GATT and WTO Agreements – clearly means that South Africa did not wish to incorporate this provision into municipal law, and that regard should specifically be had only to section 32(4) of the Act when normal values had to be determined for NME countries. The SCA then inexplicably held that there is no duty on ITAC to consider section 32(4), which is the only subsection where this information would be relevant. Accordingly, the SCA condoned ITAC summarily rejecting information submitted to it in good faith without considering that information, and without providing reasons for disregarding it. It is submitted that this is tantamount to sanctioning unfair administrative procedure.¹⁵⁴ This finding is even more confounding when one considers Harms AP’s statement that the ‘words “goods in question” [in section 32(4)] indicate that one is not concerned with the country as a whole or even any particular enterprise but with the particular goods from a particular source’.¹⁵⁵ Industry had submitted specific, rather than general, information.¹⁵⁶

Harms AP concurred with and quotes with approval from the ITAC affidavit

ITAC may only depart from the country of origin normal value if it *concludes*, in the course of its determination, that the country of origin normal value is not determined according to free market principles as a result of government intervention. It is not obliged to enquire in this question. It is not even obliged to consider it *unless there is substantial reason to think that the country of origin normal value may not be determined according to free market principles*. It must then consider the available evidence and come to a conclusion one way or the other.¹⁵⁷

It is the first line that is particularly important here: the words ‘if it *concludes*’ pre-suppose that there must have been an investigation. It is clear from the record, including the public reports, that no investigation in terms of section 32(4) of the ITA Act was conducted. Despite finding that there was no onus on ITAC to conduct an investigation into whether section 32(4)

¹⁵⁴ See s 33 of the Constitution Act, 108 of 1996. Ss 6(2)(e)(iii) and 6(2)(f)(ii)(cc) of the Promotion of Administrative Justice Act, 3 of 2000, provide as follows: ‘A court of tribunal has the power to judicially review an administrative action if (e) the action was taken (iii) because ... relevant consideration were not considered; [or] (f) the action itself (ii) is not rationally connected to (cc) the information before the administrator.’ *ITAC v SATMC* par 35.

¹⁵⁵ *ITAC v SATMC* par 35.

¹⁵⁶ See the public file to the investigation, which shows that the SATMC had submitted information related to *inter alia* state shareholding, state control over investment and management decisions, preferential access to loans, significant state trading, and research undertaken on behalf of companies or paid for by the state.

¹⁵⁷ *ITAC v SATMC* par 37. (Emphasis in original.)

of the ITA Act applies, Harms AP then found that ITAC – on the basis of its affidavit and contrary to all public and internal reports – had in fact conducted such an investigation, even though this ‘investigation’ did not reflect any of the information submitted in this regard by the industry, and the findings it reached were in direct conflict with the information submitted by the SATMC. Furthermore, considering the information that had been submitted, there was indeed ‘*substantial reason to think that the country of origin normal value may not be determined according to free market principles*’. This indicates that, in terms of Harms AP’s own finding, ITAC should have been obliged to consider the issue. Harms AP’s conclusion that ITAC ‘must then consider the available evidence and come to a conclusion one way or the other’¹⁵⁸ is correct – the problem, however, is that he applied it inconsistently and approved ITAC’s non-consideration.

Effect of judgment of the Supreme Court of Appeal

In essence, the Supreme Court of Appeal’s judgment has rendered section 32(4) of the ITA Act and regulations 8.14 – 8.16 redundant. This means that although an anti-dumping investigation can still be initiated on the basis of normal values in third or surrogate countries – as agreed to in the RoU – once an exporter has cooperated it will *always* be treated as operating under market conditions regardless of the extent of government intervention, including control over decisions related to investment, production, sales, and costs.¹⁵⁹

The SCA’s finding that ITAC bears no onus to conduct investigations under section 32(4) of the ITA Act – not even where an investigation has been initiated on that basis and where specific information in that regard has been submitted by the domestic industry – has far-reaching implications not only for all future anti-dumping investigations against China, but also for investigations against other countries where exporters may be operating under non-market conditions. Although South Africa does not have a list of these countries, the EU¹⁶⁰ and India¹⁶¹ regard countries such as Albania, Armenia, Georgia, North Korea, and Uzbekistan as non-market economies.

¹⁵⁸ *Ibid.*

¹⁵⁹ See ITAC’s letter of 31 August 2005 in this regard – available on the public file.

¹⁶⁰ Under Council Regulation 519/94 (1994 *Official Journal* L67/89) the EU regards the following countries as operating under non-market conditions: Albania, Armenia, Azerbaijan, Belarus, the People’s Republic of China, Georgia, Kazakhstan, North Korea, Kyrgyzstan, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam. Note that Ukraine has since been recognised as a market economy – Council Regulation 2117/2005 (2005 *Official Journal* L340/17).

¹⁶¹ In terms of s 2 of Customs Notification (NT) 1/2002 dated 4.1.2002, India regards the following countries as operating under non-market conditions: Albania, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, North Korea, Kyrgyzstan, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam.

Harms AP's judgment indicates that there will never be a duty on ITAC to determine whether sales in a country, including China, are made under free market principles. ITAC may, in terms of the judgment, disregard all information in this regard and simply determine whether sales were made in the ordinary course of trade. Considering that sales not made under market conditions can still be made in the ordinary course of trade – in that such sales could have been made at prices above reflected costs – this could have serious repercussions for South African industry. It could well happen that a company in China sells in its domestic market at a profit, and thus in the ordinary course of trade, yet the costs are significantly influenced by government intervention, present or past. For example, where a company set up under a non-market regime is subsequently privatised, but the privatisation does not take place at market related prices, this could have a significant impact on its depreciation account. In capital-intensive industries this could substantially decrease the reflected cost of production. Likewise, the lack of organised labour negates collective bargaining, and may have the effect of suppressing wages, which could have a marked cost effect on labour-intensive industries. Likewise, an administered exchange rate can have a significant impact on both the cost of production and export prices.

The same applies to the supply of goods by state-owned enterprises in an NME where no determination is made as to whether such sales take place under market conditions. The net effect is that ITAC will determine a cost structure that may significantly undervalue what costs would have been in the absence of significant government intervention. This means that South African producers will be forced to compete against these prices without equivalent government assistance or protection for South African industries. This negates the entire purpose of the ITA Act.

CONCLUSION

China has notched-up important anti-dumping victories in the WTO, the EU, and South Africa that stand to benefit its exporters in future. This will in all likelihood result in lower levels of, or no, anti-dumping duties being imposed in both these markets and may assist Chinese exporters to access those markets more fully. While the victories in the ECJ and the WTO will ensure that China's rights under its Protocol of Accession are upheld, its victory in South Africa goes far beyond its rights both under its Protocol of Accession and that which was negotiated bilaterally under the MoU and RoU. This operates to the detriment of the domestic industry.